Thameside Hospital v Mylott
UKEAT/0352/09/DM UKEAT/0399/10/DM

Keywords: Reasonable Adjustments –Adjustment Preventing Disadvantage - Ill Health Retirement – Remedy

Appeal by the R against decisions of unfair dismissal and disability discrimination. Appeal and cross-appeal against remedy decision.

FACTS

C went off sick with stress and anxiety following an incident of alleged offensive behavior by a manager. Medical evidence suggested that C's anxiety and his ability to return to work would be helped by an independent management investigation. This did not happen. Instead C was required to use the bullying procedure, the outcome of which made no finding about bullying but stated there were "communication" issues.

C was later dismissed due to capability. He was not given ill health retirement. After his dismissal C appealed. He stated that R had failed to make reasonable adjustments including that R had acted too quickly in dismissing him and had failed to consider ill health retirement. C's appeal was dismissed and C made claims of unfair dismissal and disability discrimination to the ET. The ET held that R had failed to make reasonable adjustments and should have: (a) carried out an independent management review to investigate the bullying; (b) made a finding about whether C had been bullied; (c) taken into account both the Occ. Health advice and the finding about "communication issues" when dismissing him; and (d) looked into the possibility of ill health retirement.

HELD

The EAT upheld the findings in relation to adjustments (a) to (c) above. The EAT rejected the argument that, since C had not recovered by the hearing, the Tribunal was wrong to conclude that the adjustments would have enabled his return to work. The EAT held that this finding was open to the ET on the evidence. The EAT allowed the appeal in respect of (d) and held that the duty to make adjustments did not extend to enabling an employee who was no longer able to perform his own role (or an alternative one) to leave on favourable terms. Underhill J stated *"The whole concept of an adjustment seems to us to involve a step or steps which make it possible for the employee to remain in employment and does not extend to, in effect, compensation for being unable to do so."* There was therefore no duty to offer Ill health retirement since there was no PCP that had an *"effect"* on C.

The EAT also allowed the appeal against compensation for future loss of earnings. Although there was sufficient evidence to find that the adjustments *might* have helped C to return to work there was insufficient evidence to make an award of compensation on the basis that he *would* have returned to work. The EAT upheld the award for injury to feelings, rejecting the argument that it must fall within the 1st Vento band if it was a one off event.

COMMENT

S.4A DDA 1995 states that an adjustment must "prevent" the disadvantage. At para. 83 Underhill J states that the *"irreducible minimum"* that has to be proved is that the adjustment *might* ameliorate the effect of C's disability (in this case that he *might* have returned to work). This is arguably a broader interpretation of "prevent" than previous cases (cf: *Project Management Institute v Latif* [2007] IRLR 579). It is important to note that even if C proves that the adjustment *might* have prevented the disadvantage for the purposes of liability he must still, in most circumstances, prove that it *would* have prevented the disadvantage for the purposes of remedy.